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United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1943

No. 634

KENNETH M. KEEFE and WALLACE D. BRADFORD,
Petitioners and Appellants,
vs.
EARL L. CLARK, Drain Commissioner of Oakland County, Michigan, and
BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents and Appellees,
CITY OF ROYAL OAK, Intervenor

BRIEF FOR APPELLEES

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CITY OF ROYAL OAK, Intervenor

BRIEF FOR APPELLEES

SUMMARY OF APPELLEE'S POSITION

1. Under the provisions of the Michigan general tax law as it existed when appellants purchased their bonds, lands to which the State had acquired absolute title through tax delinquency, when sold by the State, were sold with all liens cancelled. (*Auditor General v. Clifford*, 143 Mich. 626, p. 630.)

2. After the passage of Acts 114 and 155 of 1937, the same situation existed, the only difference being that the date the State would acquire absolute title was accelerated

and appellants admit such acceleration does not violate the Federal Constitution (p. 26 Brief for Appellants).

3. Appellants were deprived of nothing, hence their claim of impairment contemplated by Art. I, Sec. 10, U. S. Constitution is without foundation.

FACTUAL AND LEGAL BACKGROUND

1. On the 1st day of November 1927, the East Clawson Storm Sewer Drain District issued bonds to pay for the construction of a drain to service the district (R. 7-8).

2. The law of Michigan was part of such contract as was made. *Home Building & Loan Assoc. v. Blaisdell,* 290 U. S. 398, 88 A. L. R. 1481; *Keefe v. Oakland County,* 306 Mich. 512.

3. Three pertinent provisions of the drain law, Act 316 of 1923 and Act 129 of 1939 an amendment to section 18, are involved, section 5 (M. S. A. 11.91), section 15 (M. S. A. 11.101), and section 18 (M. S. A. 11.104).

Section 5 reads as follows:

> "All drain taxes assessed under the provisions of this act shall be subject to the same interest and charges, and shall be collected in the same manner as state and other general taxes are collected, and collecting officers are hereby vested with the same power and authority in the collection of such taxes as are or may be conferred by law for collecting general taxes. Drain taxes, when collected shall be returned to the county treasurer to be disbursed by him. In all cases where suit is brought against the collector arising out of the collection of any drain tax, the county shall defend such officer in the same manner that he has now the right to be defended in the collection of general taxes. No suit shall be instituted to recover any drain tax or

money paid or property sold therefore, or for damages on account thereof, unless brought within thirty days from the time of payment of such money to, or sale of such property by, the collecting officer; and if such tax shall be paid under protest the reason therefor shall be specified, and the same procedure observed as is or may be required by the general tax law. All taxes levied under the provisions of this act, with all lawful costs, interest and charges, shall be and remain a perpetual lien upon the lands upon which they are assessed, and a personal claim against the owner or owners of such lands until they are paid."

Section 15 reads as follows:

"In cases where the issuing of bonds shall have been determined upon, as hereinbefore provided, and subject to the provisions of section one (1) of chapter eight (8), the commissioner may borrow money in anticipation of the collection of such installments and may issue as evidence thereof the bonds of the drainage district as hereinbefore defined. Such obligations shall specify on their face that they are payable out of the installments of or in taxes to be thereafter collected, *and the amount thereof shall not exceed the aggregate of the installments levied.* Bonds issued hereunder shall be signed by the commissioner on behalf of the drainage district, shall be countersigned by the county clerk and shall be payable in annual installments equal in number to the installments of taxes, shall mature not earlier than March first (1st) nor later than June first (1st) of the year following the due dates of the respective installments of taxes. The number of installments shall not exceed twenty (20): * * * *The Commissioner shall therein pledge the credit of the drainage district, including the lands embraced within such district and the townships, cities, villages, counties and state trunk line highways assessed at large, in the proportion that*

they are taxed for the benefits received thereby. • • • PROVIDED, HOWEVER, That this amendatory act shall not be considered to affect any bonds or refunding bonds issued prior to the effective date hereof and subsequent to the effective date of act number three hundred thirty-one (331), public acts of nineteen hundred twenty-seven (1927), or any refunding bonds hereafter issued to replace the same.

PROVIDED FURTHER, That no county shall advance or pay out of its general funds any moneys for or on account of principal or interest of any drain bonds issued prior to the effective date of act number three hundred thirty-one (331) of the public acts of nineteen hundred twenty-seven (1927), or any refunding bonds issued to replace the same." (emphasis supplied.)

Section 18 reads as follows:

"If there is not sufficient money in the fund in a particular drain at the time of the maturity of the bonds last to mature to pay all outstanding bonds with interest, whether such insufficiency is due to the anticipation of installments as provided in the preceding section, or to failure to sell any lands for delinquent taxes, or to any other cause, it shall be the duty of the commissioner to at once levy an additional assessment as hereinbefore provided in such an amount as will make up the deficiency. Any surplus remaining after the payment of the bonds and interest shall remain in the county treasurer and be used for the maintenance of the drain."

Act 129 of 1939 amended Section 18, by inserting the following language:

Chapter X, Section 18, • • • "and in case bonds or other evidences of indebtedness are issued pursuant to act number 13 of the public acts of 1932,

first extra session, and acts amendatory thereto, to refund the outstanding indebtedness of a drain district, the governing body of such drain district shall provide, subject to the directions of the public debt commission, for such additional levies of assessments prior to the maturity of such refunding obligations as it shall deem necessary to prevent default in payment of interest on such obligations, and the maintenance of a sinking fund for their retirement, and it shall be the duty of every officer charged with the determination of the amount of taxes to be raised, or the levying of such taxes, to make or to cause to be made the additional levies as provided." • • •

The Michigan Supreme Court in the case of *Municipal Investors Association v. City of Birmingham*, 298 Mich. 314, held that lands the title to which has passed through the State were free from pre-existing liens and that deferred installments of special assessments were liens and hence removed.

Appellants, not parties to that action, instituted this suit under the Michigan declaratory judgment law to attack the *Municipal Investors v. Birmingham* decision and challenge Act 155 of 1937 as being violative of Art. I, Sec. 10, Federal Constitution. For the purpose of this brief we will assume that Act 114 of 1937 was also challenged as to constitutionality. (See Motion to Dismiss.)

QUESTION OF LAW INVOLVED

Did Acts 114 and 155 of the Michigan Public Acts of 1937 or either of them deprive Appellants of any rights in violation of Art. I, Sec. 10, U. S. Constitution?

Appellees say, No.
Appellants say, Yes.

DEPRESSION AND REMEDIAL STEPS BY LEGISLATURE

In the late twenties and early thirties the nation was in an economic depression of alarming proportions, Michigan was severely hit, unemployment was rife, welfare was at a peak, tax delinquencies were universal, mortgage and contract foreclosures were depriving thousands of their homes, there was food rioting.

When the 1933 Michigan legislature convened, drastic steps were taken to meet the existing emergency.

The annual tax sale was stopped, in Act No. 2, P. A. 1933, an emergency was declared under the police power and a moratorium granted on mortgage foreclosures in Act No. 98, P. A. 1933. An emergency was declared and a moratorium granted on land contracts in Act No. 122, P. A. 1933, Chancery Courts were given power to fix a minimum sale price for real estate where deficiency decrees were involved in Act No. 229, P. A. 1933, an emergency was declared and the governor was authorized to declare a bank holiday in Act No. 47, P. A. 1933, an emergency was declared and 1932 and prior taxes were permitted to be paid over a ten year period, Act No. 126, P. A. 1933. Acts 63 and 267, P. A. 1933 cancelled penalties, fees and interest. The failure of the real property tax induced the passage of the Sales Tax, Act 167, P. A. 1933.

The year 1935 saw the legislature still fighting the emergency, Acts No. 3, 4, 18, 57, P. A. 1935.

In 1937 the fight was still on, Acts No. 1, 2, 28 and then the rehabilitation started to take place. Act No. 325 of 1937 set a tax sale for the first Tuesday in May 1938. Act No. 114 of 1937 set up the form of decree for the sale under Act 325 and contained this provision,

"It is further ordered, adjudged and decreed that title to each parcel or land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the state, shall become absolute in the state of Michigan on the expiration of the period of redemption from such sale, and all taxes and other liens and encumbrances, of whatever kind or nature * * *."

Act 153 of 1937 established the State Land Office Board prescribed its duties and established the machinery for disposing of the lands unredeemed, and the title to which had passed to the state. Act 325 of 1937 amended the general tax law, Section 74 and gave eighteen months to redeem from the 1938 sale.

The expiration of the period of redemption found the State owning nearly half the area thereof and upwards of 580,000 parcels below Bay City, including 65% of the drain district involved (Ex. 2—R. 56 A).

The historical background related above, was generalized by the Michigan Supreme Court in *Baker v. State Land Office Board*, 294 Mich. 587, pp. 592-3.

APPELLANT'S CLAIM

Petitioners now claim that Acts 114 and 155 of 1937 originally and as amended violate Article I, Sec. 10 of the United States Constitution. (They have abandoned other arguments of unconstitutionality in their brief.)

APPELLANT'S RIGHTS UNDER ACT 155

Let us examine the provisions of Act 155 of 1937 and, aside from the machinery for disposal of state lands, see what rights appellants had thereunder. Sec. 10 of the Act (M. S. A. 7.960) provides:

"All moneys received by the State Land Office Board, any County Treasurer or the Department of Conservation, under the provisions of this act, and all moneys received after the expiration of this act by the Department of Conservation pursuant to any sale by said State Land Office Board on time payment plans, shall be credited to the general fund of the State, and, after first deducting such commissions and maintenance costs as are authorized in sections 4 and 8 of this act shall be paid to the several County Treasurers who shall remit the same to the several tax assessing units, including municipalities collecting thereon delinquent and special assessments of such units cancelled against any description of land sold under the provisions of this act, by the board, any County Treasurer or the Department of Conservation * * * such cancelled taxes and special assessments assessed or levied against said lands prior to the vesting of title in the State of Michigan." M.S.A. 7.960.

The East Clawson Storm Sewer Drain District received its share of the proceeds of the sale of all lands in the drain district and consequently, any contractual rights appellants had under Act 155, they have received the benefit of, and of course, cannot not be heard to complain that their contract is violated or impaired by operation of Act 155. It should be here noted that appellants, in the Oakland County Circuit Court and the Michigan Supreme Court, complain that Act 155 of 1937 violated Article I, Section 10, of the Federal constitution and here make the same complaint in spite of the fact that they received the full benefit of the provisions of Act 155.

APPELLANT'S RIGHTS UNDER ACT 114

Act 114 of 1937 which amended the decree of sale provided in the General Tax Law, reads as follows:

> "It is further ordered, adjudged and decreed that title to each parcel of land ordered in this decree to be offered for sale, and which parcel of land is bid in at such sale to the state, shall become absolute in the State of Michigan on the expiration of the period of redemption from such sale, and all taxes, special assessments, which are charged against or are liens upon such parcels, and other liens and encumbrances, against such parcels of whatever kind or nature, shall be cancelled as of such date * * *."

Act 114 of 1937 is the act which reverted the delinquent lands to the State with the encumbrances specifically removed and if either act can be complained of it must be Act 114 rather than Act 155 of 1937.

CONTINGENCIES AFFECTING BONDHOLDERS

It is the position of Appellees:

1. That at the time Appellants purchased their bonds, several contingencies existed, the development of any one of which would prevent bondholders from recovering 100 cents on the dollar on their investment, namely,

   A. Reversion to the state of a portion of the district;

   B. Intervention of Eminent Domain;

   C. Limitation on taxing power by rule that assessments cannot exceed benefits resulting;

2. That one of those contingencies did develop, namely *abnormal* tax delinquency.

3. That, fundamentally, the passage of Acts 114 and 155 of 1937 did not change the contract relation with bondholders in any respect.

4. That there is no impairment of contract as contemplated by Art. I, Sec. 10, United States Constitution.

5. That instead of depriving appellants of any contractual rights, Act 114 saved appellants from a possible greater total loss and salvaged something out of a bad investment, rather than deprived appellants of any rights.

6. That the Motion to Affirm should be granted or the decision of the Michigan court upheld.

LAW AND ARGUMENT

As is pointed out in a previous portion of this brief, section 18, of the drain law provides for one additional spread of tax in case of a deficiency in the drain fund. Section 5 of the act provided that the lien appellants had to secure the indebtedness represented by their bonds be foreclosed by sale of the lands under the provisions of the general tax law.

To place the further burden of a deficiency assessment on the lands which were already valueless through an existing tax burden and were on a wholesale basis being returned to the state, would have procured nothing for appellants. As was said by the Supreme Court of the United States in *Municipal Investors v. City of Birmingham*, 216 U. S. 152,

> "If the stated powers of the village to levy an assessment on improvement district property required that the lots assessed, after sale for default in their installments, should be subject to an additional assessment to cover such deficiencies, the burden might depress their values to a point where little if anything could be realized for the bondholders, and successful sale for non-payment would be frustrated. This would clearly be true, where as here, a very large proportion of the assessment were defaulted."
>
> "To this we (Michigan Supreme Court) add the obversation that, if the lands were again subject to a deficiency assessment, after sale to the State and conveyance by it to a third party, the possibility of the restoration of this property to the tax rolls would be considerably lessened because prospective buyers might well hesitate to assume such an obligation."

The right to an additional deficiency assessment must be subordinated to the provision of Sec. 5 of the drain law, providing for foreclosure of the existing lien for taxes in pursuance of the provisions of the general tax law. No choice existed, if the lands were delinquent, they were sold the third year thereafter and if there were no purchasers, reverted to the state. After five years the title in the state became absolute and the lands could be sold free from liens. (*Audior General v. Clifford*, 143 Mich. 626, p. 630).

Act 114 of 1937 amended the general tax law which could not be construed as a violation of the contract rights of appellants because appellants had specifically contracted to have their lands sold, in compliance with the provisions of the general tax law. M. S. A. 11.91. In other words, appellants by contract had the right to have the lands subjected to the lien of drain taxes, sold in pursuance of the general tax law in the event of failure of the property owners to pay the taxes. The lands were so sold and appellants have received their share of the proceeds and they should not now be heard to complain of a violation of their contract rights having received the benefits of their "maximum security." *Keefe v. Oakland County*, 306 Mich. 503, p. 511 (R. 44).

LIEN OF DRAIN TAXES

Appellees do not dispute the fact that the drain taxes assessed upon the several parcels were a lien upon the several parcels under the Michigan drain law.

The machinery provided by law for the foreclosure of such liens was the general tax law of Michigan and appellants had no right to foreclosure in any other manner. Complete foreclosure was had. Sale at the tax sale in

1938 and subsequent years, followed by a failure to redeem at a specific time, vested title to the lands in the state, free and clear of encumbrances under Act 114 of 1937 (R. 43). Redemption is not a matter of right, but privilege which can be taken away by the legislature. *Keeley v. Sanders,* 99 U. S. 441, *Dumphey v. Hilton,* 121 Mich. 315. Subsequent sale under Act 155 of 1937 supplied appellants with their share of the proceeds of the sale and foreclosure of the lien. It is difficult indeed to see how their contract has been impaired when they have had the maximum benefit of the contract. The results obtainable from the most drastic remedy provided was complete foreclosure and sale of the security covered by their lien.

HYPOTHETICAL CASE

Suppose for instance there were no at large assessments on any municipalities in the drain district. That all of the assessments were on individual parcels of property. Let us further suppose that every parcel in the district became delinquent, reverted to the state under the provision of Act 114 of 1937, and all were sold by the state under provisions of Act 155 of 1937, and the proceeds distributed to the taxing units including this drain district. Here would be a case where the lien on the security pledged would have been foreclosed and the maximum obtainable from the liquidation procured. Can appellants point out any sound legal theory showing a right to again assess the lands in the drain district? We think not.

The Michigan Supreme Court in this case held that in the proportion that the lien was foreclosed it no longer exists that the lien the appellants had still exists on the property which did not revert to the state. Appellants still have, in regard to that property, everything they had

before the passage of Acts 114 and 155 of 1937 and have been deprived of nothing in that respect.

It should be noted here that the effect of the Michigan court's decision in this case is to interpret its own statutes namely, the drain law, to mean that no parcel of land in a drain district is insuror of payment of the full indebtedness of the district. In other words, at no time did any parcel of land in a drain district, or any municipality assessed at large therein, become responsible for more than its share of the indebtedness of the district or its percentage of any deficiency, and the Supreme Court of the United States should have no quarrel with this interpretation under the holding in *Erie Railroad v. Tompkins*, 305 U. S. 64, 82 Lawyers Edition 787.

CHALLENGE TO APPELLANTS

Appellees challenge appellants to find any language in the provisions of their contracts which gives them the right to liquidate in pursuance of their contracts, 65% of their security by foreclosure and then turn around and force the remaining 35% of the original drain district to pay the loss sustained by appellants, through liquidation of their security for less than the obligations to which it was originally committed. Default on one parcel resulted in no increase in benefit to another parcel and benefit is the yardstick by which the right to assess is measured. (M. S. A. 11.57.)

To make 35% of an original drain district bear 100% of the liability of that district would clearly be to deprive the 35% of their property without due process of law, because the Michigan drain law never permitted or contemplated such procedure. *Keefe v. Drain Commissioner*, 306 Mich. 503, p. 513.

Appellees further challenge appellants to point out any provision of the drain law which makes one of the several parcels in a drain district insuror for the performance of another parcel. If such were the law it is entirely conceivable that a portion of a drain district could go on paying forever with the debt constantly growing larger because deficiency assessments under the drain law must be made in pursuance of section 18, M. S. A. 11.104 "as hereinbefore provided" which refers back to section 3, of chapter 9, M. S. A. 11.101, which reads as follows:

> "Whenever the amount assessed for the construction of any drain shall not be sufficient to complete the same and to pay all the costs and incidental expenses or to pay the principal and interest on bonds if such are issued, a further assessment shall be made to meet the deficit or additional expense. *Such further assessment shall be apportioned, assessed, levied and collected as provided in the first instance, and on the same percentage, and shall be collected in one year,* but there shall be no review of nor appeal from such further assessment: * * *" (emphasis supplied.)

CONTRACT

That, "The law of the land," was a part of such contract as the petitioner-bondholders had, is undisputed (appellant's brief p. 11). Let us analyze their contract and ascertain if possible in what manner acts 114 and 155 of 1937 have deprived them of anything rising to the dignity of impairment as contemplated in the provisions of Art. I, Sec. 10 of the United States Constitution.

ACT 155 P. A. 1937

At the outset Act 155 of 1937 deprived them of nothing. It set up the machinery for the disposal of state owned lands and provided that (Sec. 10),

> "All moneys received by the state land office board, any county treasurer or the department of conservation, under the provisions of this act and all moneys received after the expiration of this act by the department of conservation pursuant to any sale by said state land office board on time payment plans shall be credited to the general fund of the state, and shall be accounted for with the several tax assessing units, including municipalities collecting their own delinquent taxes, as provided in the general tax law, in proportion to the delinquent taxes and special assessments of such units cancelled against any description of land on account of which revenue is received by the board as provided in this act."

The appellants have received the moneys due them under the act, had the benefit of all provisions operating in their favor, so it seems there could be no useful purpose served in further pursuing Act 155 of 1937.

ACT 114 OF 1937

Act 114 of 1937 encompasses such issues as are here involved and if appellants claim of unconstitutionality can be substantiated in any particular it must be directed against Act 114.

What Were Appellant's Contract Rights?

These elements enter into it:

I. The provisions of the bond (R. 7-3).

II. The provisions of the drain law, principally sections 5 and 18 and 15 and the portions of the general tax law covering the foreclosure of tax liens.

III. Pertinent provisions of the constitution.

IV. The police power of the State of Michigan.

We consider them in the order named above.

I.

"The Provisions of the Bond"

Inasmuch as the provisions of the bond must be restricted by the statutory authority of the Drain Commissioner to execute the same, we pass immediately to the second heading to lend particular attention to Sec. 15 of the drain law.

II.

"The Provisions of the Drain Law, Principally Sections 5, 18 and 15, and the General Tax Law"

The pertinent portion of Sec. 15, Chapter X of the drain law, Act 316 of 1923 as amended by Act No. 331 of 1927, M. S. A. 11.101, effective on the date of issue of Appellant's bonds, read as follows,

> "In cases where the commissioner determines that the taxes assessed for benefits received shall be collected in more than one installment, said commissioner by and with the written approval of the judge of probate and the county treasurer of the county, may borrow money in anticipation of the collection of such installments and may issue as evidence thereof the bonds of the drainage districts as hereinbefore defined. Such obligations

shall specify on their face that they are payable out of the installments of drain taxes to be thereafter collected, and the amount thereof shall not exceed the aggregate of the installments levied. Bonds issued hereunder shall be signed by the commissioner on behalf of the drainage district, shall be countersigned by the county clerk and shall be payable in annual installments equal in number to the installments of taxes, shall mature not earlier than March first nor later than June first of the year following the due dates of the respective installments of taxes. The number of installments shall not exceed fifteen and the amount of each installment shall be fixed by the commissioner to correspond as near as may be to his estimate of the amount of taxes actually collectible each year. *The commissioner shall prescribe the form of the bond by and with the written approval of the judge of probate and the county treasurer of the county and shall therein pledge the credit of the drainage district, including the lands embraced within such district and the townships, cities, villages, counties and state trunk line highways assessed at large, in the proportion that they are taxed for the benefits received thereby:* Provided, That the written consent as above set forth of any judge of probate or county treasurer shall not be required in proceedings relating to inter-county drains. Such bonds shall be advertised and sold by the drain commissioner after the manner provided for the advertisement and sale of municipal bonds by act number two hundred seventy-three of the laws of nineteen hundred twenty-five and any amendments which may be made thereto governing such advertisement and sale. If any premium is received thereon such premium shall belong to the fund of the drain. The proceeds derived from the sale of such bonds shall be deposited with the county treasurer to the credit of the drain fund. The county treasurer shall safely keep all such bonds until sold as above provided."

The following portion of the section quoted above must be weighed carefully, "The commissioner shall prescribe the form of bond by and with the written approval of the judge of probate and the county treasurer of the county and shall therein pledge the credit of the drainage district, including the lands embraced within such district and the townships, cities, villages, counties and state trunk line highways assessed at large, IN THE PROPORTION THAT THEY ARE TAXED FOR THE BENEFITS RECEIVED THEREBY."

The drain commissioner could never pledge more than authorized by the foregoing language, *Lawrence v. American Security Co.*, 263 Mich. 586, which in this case sums up as follows:

District	77.5% of indebtedness
Oakland County	3.5% of indebtedness
Township of Troy	2.5% of indebtedness
Township of Royal Oak	6.5% of indebtedness
Village (now city) of Clawson	10.0% of indebtedness

No one of these units was ever liable for more than the percentage stated above, *either of original cost (M. S. A. 11.104)* or deficiency (M. S. A. 11.181).

The drain commissioner never possessed authority to pledge more. He never had authority to pledge the full faith and credit of any unit (M. S. A. 11.101). *Keefe v. Bloomfield Drain District*, 119 Fed. (2), p. 157.

The bond is strictly a special assessment bond and IS NOT A GENERAL OBLIGATION BOND. *Moore v. Nampa*, 276 U. S. 536; *Divide Creek Irrigation District v. Hollingsworth*, 96 A. L. R. 937, 43 A. J. 495, Sec. 282.

The Michigan Supreme Court treated the bond as a special contrasted with a general obligation bond and their opinion in this case is predicated on that theory. Their

interpretation of Michigan statutes is binding on this court (*Erie Railroad v. Tompkins,* 304 U. S. 64, 82 Lawyers Edition 78, and *Keefe v. Royal Oak,* 87 Fed. (2) 786).

All that appellants ever had a right to, by way of reassessment, was the portion of any deficiency which the original percentage allocated to the unit, bore to the total deficiency (M. S. A. 11.104, 11.101).

Let us go one step further. When a Michigan drain roll is made, each unit whether a single lot, a piece of acreage, a trunk line highway or a municipality is allocated its percentage of total cost.

The district in this case, for instance, was not allocated 77.5% of the cost, but the aggregate of percentages allocated to individual parcels totalled 77.5% of the entire cost. Thus, the liability of each parcel for original cost and deficiency was fixed at the inception of the roll and no parcel or unit at large guaranteed payment by any other parcel or unit.

When the provisions of the general tax law (Act 114 and Act 155 of 1937) became operative, and such provisions were a part of the CONTRACT (M. S. A. 11.91) the lien was foreclosed and some of the source of revenue of the district liquidated. In effect part of the originally obligated parcels went through bankruptcy. Part still remains and the liability of that part for existing deficiency is limited to the percentage originally allocated to that part.

When the Michigan Supreme Court made the following statement in *Baker v. State Land Office Board,* 294 Mich. 587, p. 599,

> "It is claimed that the statute destroys vested rights of municipalities to tax liens and assessments already assessed and levied, and destroys property

> and contract rights of individuals who have purchased bonds under the assumption of their payment through collection of the very taxes and assessments which the act cancels. *'In addition to our determination as above expressed, it can be said that such purchasers can be assumed to have purchased with knowledge that the lien upon the property securing such taxes and assessments might be displaced.''* (Emphasis supplied.)

it interpreted the drain law of Michigan, and that interpretation is especially significant here because it goes to the very base of such contractual rights as exist in this case.

Both in the Michigan Supreme Court and here, appellants claim that appellees, "are obliged by Act 129 P. A. of 1939, to levy an additional assessment upon all taxable property in East Clawson Storm Sewer Drain District to provide for payment of the outstanding bonds and interest thereon."

Act 129 of 1939, passed twelve years after these bonds were issued, could have been repealed without depriving appellants of any original rights. (*Baker v. State Land Office Board,* 294 Mich. 587, p. 601). It conferred rights non-existent at the time the bonds were issued, by authorizing deficiency spreads before all of the bond issue was due, whereas the drain law at the time the bonds were issued provided for one deficiency spread only in case the original cost was underestimated or after all bonds had become due. ANY DEFICIENCY SPREAD HAD TO BE IN THE ORIGINAL PERCENTAGES, (M. S. A. 11.101) and there could be only *one* deficiency spread. The new provisions of Act 129 of 1939 only affected *refunded* bonds. *The bonds here have not been refunded and Act 129 has no application different than the original act.*

The decision of the Michigan Supreme Court in this case authorized a spread on all the unreverted taxable lands in the district and the municipalities at large IN PROPORTION TO THEIR ORIGINAL LIABILITY and this was all appellants ever had a right to. Constitutionally, this gave them their due. They have been deprived of nothing. (*Keefe v. Oakland County*, 306 Mich. 503, p. 512.)

The purchasers of a Michigan drain bond *never*, under the Michigan law, had the right to expect 100% payment of principal and interest if part of the lands in the district reverted to the state. For instance, let us take a drain estimated to cost $1000.00, the cost to be spread on two municipalities at large and 100 parcels (the district), as follows:

County at large..... 10%
Township at large..... 20%
District ..... 70% Which 70% would be broken down on the 100 parcels composing the district or, assuming the benefits to be equal, each parcel would be a .7% of the cost.

Now suppose the bonds ran for fifteen years and a deficiency of $100.00 existed when the last bonds matured. Let us further suppose that 50 of the 100 parcels in the district had reverted to the state through failure of anyone to purchase the tax titles thereon, which situation could have existed when appellants bought their bonds or fifteen years thereafter. The 50 parcels owned by the state could not be assessed for any deficiency. The other units, namely, the county, townships and district (now 50 parcels) could only be assessed for deficiency in proportion to the original assessment or,

County	10%	of	$100.00	or $10.00
Township	20%	of	100.00	or 20.00
District	35%	of	100.00	or 35.00
Total	65%			65.00

Wherefore, because only one deficiency spread could be made the bondholders, of necessity, must bear the loss of $35.00 *which hazard existed when they purchased their bonds.*

The case before this court is that identical proposition, multiplied because of the abnormal tax delinquency which resulted from the depression. Analysis of the Michigan drain law discloses that this summary may be made:

WHEN APPELLANTS PURCHASED THEIR BONDS:

1. They knew (or were charged with notice) that some of their liens might be displaced by reversion of the land subject to the lien, to the State.

2. That the reverted lands could not be taxed.

3. That a deficiency might result.

4. That only one spread could be made to pick up the deficiency and that, after the bonds were all matured.

5. That no parcel or unit assessed at large was liable for more than its percentage of the deficiency and that was restricted to the exact percentage of the original cost.

6. That a deficit would still exist after the deficiency spread was made.

7. That there was no authority under the drain law to spread again to recover the remaining deficit.

8. That the loss must be borne by the holders of the bonds.

The potentiality of loss was a hazard taken by purchaser of every Michigan Drain Bond. Purchasers of Michigan drain bonds were obliged to weigh the possibility of loss in contemplating investment in drain bonds and assume the risk incident thereto. That they did so is attested by the fact that they made studies of the terriory, its probable development, adjacency to industry, desirability for home sites, etc. as reference to sales *prospecti* will show.

If Act 114 and 155 of 1937 had never been passed, appellants could and would probably have been in the same position they occupy today. How then can it be said that their rights are impaired? (M. S. A. 7.117 and *Auditor General v. Clifford,* 143 Mich. 626, p. 630.)

Eminent Domain

The exercise of the right of Eminent Domain by a municipality coupled with small scale tax delinquency could have brought about the same result and appellants purchased their bonds knowing that the right of Eminent Domain was not surrendered. For instance, suppose this situation existed:

A drain district is established as before.

County at large.....	10%
Township at large.....	20%
District (aggregate)	70%

Suppose, by Eminent Domain, ½ of the District (35%) is condemned for public purpose. The condemning public body pays in full the drain taxes including deferred installments. A portion of the remaining district defaults, the bonds all matured and there is a deficiency of $100.00.

The public lands cannot be assessed and the ratio of deficiency spread on the remainder must be the same as the original assessment. Then we would have the deficiency spread as follows:

County at large.....	10%	$10.00
Township at large.....	20%	20.00
District	35%	35.00
Total	65%	65.00

Loss to bondholders $35.00. This potential existed when appellants bought their bonds.

Special Assessment Taxes Equal to Benefit

Under Michigan law the justification for special assessments is resulting benefit and no land can be assessed for special improvements in excess of the resulting benefit.

The measure of benefit is fixed and delinquency of one or more parcels in a district does not increase the benefit to others.

> "The theory sustaining levies for sewer improvements is that the party assessed is locally and pecuniarily benefited over and above the ordinary benefits which as one of the community he receives in all public improvements to the precise extent of the assessment." *Kuick v. City of Grand Rapids,* 200 Mich. 582; *Dix-Ferndale Tax Payers Association v. City of Detroit,* 258 Mich. 390. See *Limitation of Taxing Power and Public Indebtedness,* sec. 1992, by *James M. Gray.*

The limitation of, "assessment," never being permitted to exceed, "benefit," (*Gast Realty Investment Co. v. Schneider Granite Co.,* 240 U. S. 55, cited with approval *Keefe v. Oakland County Drain Commissioner,* 306 Mich.

503, p. 514) placed another ceiling on recovery of investment. If the original assessments equaled the benefits, which presumably they did, no bondholder ever had the right to expect, in case of reversion to the state of a portion of the district, or intervention of Eminent Domain, one hundred cents on the dollar on his investment, because the delinquency of one parcel could not be shouldered onto any other. Never were the taxpaying portions of a drain district liable for more than their percentage of deficiency as a matter of contract created by the statute.

These three potentialities existed which could result in severe loss to holders of drain bonds.

1. Abnormal tax delinquency (here involved).
2. Normal tax delinquency plus intervention of Eminent Domain.
3. Possibility of assessments exceeding benefits, and these potentialities existed when the bonds were purchased and the purchasers assumed that hazard when they purchased the bonds.

One of those potentialities developed but not because of Acts 114 or 155 of 1937. It had existed before. Therefore, the consequence is that Act 114 and 155 did not in any way affect appellant's rights, or impair their contract obligations.

III.

Pertinent Provisions of the Constitution

A. Michigan Constitution.

Art. X, Sec. 9:

> "The power of taxation shall never be surrendered or suspended by any grant or contract to which the state or any municipal corporation shall be a party."

Art. II, Sec. 9:

> "No bill of attainder, *ex post facto* law or law impairing the obligation of contract shall be passed."

The Michigan Supreme Court has upheld the constitutionality of both Acts 114 and 155 of 1937 in all particulars, *Baker v. State Land Office Board,* 294 Mich. 587; *Welch v. State Land Office Board,* 295 Mich. 85; *Municipal Investors Association v. Birmingham,* 298 Mich. 314; *Keefe v. Oakland County,* 306 Mich. 503.

B. Federal Constitution.

Art. I, Sec. 10:

> "No State shall enter into any treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the obligation of Contracts, or grant any Title of Nobility."

Inasmuch as the entire theme of this brief is directed to proving the absence of violation of any provision of Art. I, Sec. 10, United States Constitution, we make no specific argument here.

IV.

The Police Power of the State of Michigan

That the police power of the state was brought into play is evident from the following:

1. The declarations in the emergency acts referred to *supra* (pages 6 and 28 this brief) such as Act 98 P. A. 1933,

> "An emergency affecting the general credit situation in the State of Michigan, which requires special and temporary legislation under the police powers of the State, is hereby declared to exist."

2. Act 122 P. A. 1933:

> "This act is enacted to meet an emergency through the police power of the state and the legislature hereby declares such an emergency to exist, and further declares that this act is immediately necessary for the preservation of the public peace, health and safety and to promote and preserve home ownership."

3. *Keefe v. Oakland County Drain Commissioner,* 306 Mich. 502, p. 512:

> "The rule that existing laws are read into contracts, in order to establish the obligations by the parties, is subject, however, to the well known reservation of the essential attributes of the sovereign, and this reservation must also be read into contracts as a postulate of the legal order."

4. As stated by the Chief Justice in *Home Building & Loan Association v. Blaisdell,* 292 U. S. 398, p. 437; 8 A. L. R. 1481:

"The economic interests of the State may justify the exercise of its continued and dominant protective power notwithstanding interference with contracts."

5. *Long Is. Water Supply Co. v. Brooklyn*, 166 U. S. 685:

"But into all contracts * * * there enter conditions which arise, not out of the literal terms of the contract itself. They are super-induced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong * * *. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount wherever a necessity for their execution shall occur."

We respectfully submit that appellants have been deprived of no constitutional rights through the operation of Acts 114 and 155 of 1937 and the Motion to Affirm should be granted.

REPLY TO APPELLANT'S BRIEF

General Jurisdiction

Appellees do not challenge the general jurisdiction of this court nor the finality of the decision by the highest court in Michigan. They do challenge the jurisdiction of this court to pass on the constitutionality of Act 114 of 1937 but refrain from further argument here, relying on their Motion to Dismiss for protection thereon.

Appellees do deplore the classification of this case as, "the classic case of impairment of obligations of a municipal contract by withdrawing taxing power" (p. 3 Brief

for Appellants) and brand this statement by appellants as an attempt to obscure the real issue by drawing the proverbial herring across the trail.

It is refreshing to have appellants admit (p. 5 Brief for Appellants) "The trial court's opinion makes no mention of Act 114 Michigan Public Act 1937" but of course they could not be expected to admit that they did not request the court to pass on the act. The truth becomes apparent when counsel further says, "appellants appealed from the judgment claiming that the trial court erred in denying the petition, and in his rulings that land which had been sold under Act 155 of Michigan Public Acts 1937, were exempt from an additional deficiency assessment. Appellee's Motion to Dismiss is pointed directly at this fact plus the fact that the Michigan Supreme Court:

1. Did not pass on Act 114 of 1937 and;
2. It was unnecessary to do so to dispose of the case on the challenge to Act 155 of 1937.

It seems presumptuous of appellants (p. 6, Brief for Appellants) to say in reference to the Michigan Supreme Court, "It disposes of appellant's argument on the proposition that the obligation of contracts has been impaired by saying that such impairment is justified by necessity" (R. 45). Such language does not appear in the opinion let alone (R. 45). The Michigan Court never stated that appellant's contract was impaired but consistently has denied such argument, "The impairment argument was presented in both the Baker and the Birmingham cases and denied in each decision" (R. 44).

Let us consider appellant's "Argument" (p. 9 Brief for Appellants) under point (1). They make this confession, "Appellants have never contended that land whose title

has absolutely vested in the state is subject to a tax while the state owns it."

What could be more significant? If they admit this, having asserted the law that only *one* deficiency assessment can be made and that in ratio to the original assessment (p. 12 Brief for Appellants) *how can they deny that they bought the bonds assuming the potential of loss through tax delinquency, Eminent Domain or the ceiling of benefit equal to assessment or a combination thereof?* We say to appellants, "You admit state lands cannot be taxed yet you claim the right to tax them when they are back in private hands." Suppose the State held them for 100 years, can your 4th or 5th generation pop up some day, greet the stranger in possession and say, "You owe me some money on the East Clawson Storm Sewer Drain?" We think not.

There is nothing in the opinion of the Michigan Supreme Court in this case which is not consistent with the fact that no ruling was made on Act 114 and no finding made that the bondholders contract was impaired. The Michigan Court could have said, "We do not pass on Act 114, you have raised no question concerning it, we have passed on Act 155, but it deprives you of nothing and if we were to pass on Act 114 we would have to view it in the light of an exercise of the police power, give it liberal construction and hold your rights to be secondary to those of the public." The interpretation by appellants is wishful thinking.

Appellants, after saying (p. 10 Brief for Appellants) "Appellant's petition asked that the laws existing when their bonds were issued be enforced," say "Appellees contended that such laws had been changed, so that appellants no longer had the right which they sought to have en-

forced." We challenge this court's attention to our answer (R. 24-25-26-27) which is bare of any such claim. We do claim that Acts 114 and 155 of 1937 took nothing from appellants, saved them something and their loss would have been greater if Acts 114 and 155 of 1937 had not been passed and *they bought their bonds knowing they might lose on them.*

Point (2) Appellants' Argument

Appellees concur that the statutes became a part of the bond contract (p. 11 Brief for Appellants), in fact if appellants had not so urged, the point would have been pressed by appellees. The summary of the drain law procedure is substantially as carried out on page 12 Brief for Appellants but where they say, "the full faith and credit of the district," their enthusiasm passes the bounds of the statute. The words "full faith" do not appear in the statute as reference to section 18 of the drain law (M. S. A. 11.101, pp. 3-4 this brief) will show. The drain commissioner is authorized to pledge "the credit of the district • • •, cities, villages, townships, counties and state trunk line highways assessed at large, in the proportion that they are taxed for the benefits received thereby." No more, no less.

It is interesting to observe that appellants are willing to accept a "deficiency levy • • •" the bonds being all due (p. 13 Brief for Appellants) and "periodic deficiency levies" (p. 13 Brief for Appellants) if a refunding is effected to bring Act 129 of 1939 into play. This confirms appellee's interpretation of Act 129 of 1939. BUT it also proves that the bondholders faced a loss through reversion of lands when they bought their bonds. The most they

could recover was a percentage of the deficiency. Also, if Act 129 of 1939 became operative through refunding the most the bondholders could recover would be a percentage of a percentage of a deficiency and when the last bonds to mature were matured and one final deficiency spread was made, they would still suffer a loss.

Appellees, who (p. 13 Brief for Appellants) are alleged to "concede that if it were not for the legislation enacted in 1937, the petition would have been sustained," deny completely the allegation. It has no substance in the record and misrepresents appellees position. We repeat, appellant's claim could not be sustained regardless of Acts 114 and 155 of 1937. The Michigan Court interpreted its drain law, as modified by the general tax law, in exact consistency with the contract rights of appellants unaffected by Acts 114 and 155 of 1937.

Appellants (pp. 13-14 Brief for Appellants), insisting that Acts 114 and 155 of 1937 deprived them of rights, pose this question "Was it possible, under the law as it existed when these bonds were issued, for privately owned lands in the district to be exempt from deficiency levies?" This question as framed begs the issue and invites a misconstruction of the tax laws. We submit the following questions to clarify the issue, keeping in mind that impairment is the primary objective.

1. Was the remedy for delinquency in drain assessments tied to the general tax law? (Appellants admit the answer is "yes.")

2. Does the legislature have the right to prescribe how tax liens shall be foreclosed? ("yes.")

3. Was appellant's contract subject to the legislative right to prescribe the method of foreclosure of tax liens? ("yes.")

4. Was the lien of the drain taxes treated on a par with other taxes? ("yes.")

5. Did drain districts receive the same ratio of proceeds of liquidation as other taxing units? ("yes.")

6. Did drain districts suffer the same ratio of loss as other taxing units? ("yes.")

7. Was there any discrimination in this process? ("no.")

8. Did the possibility of a diminished district through tax delinquency and title reversion to the state exist when appellants bought their bonds. ("yes.")

9. Was there any guaranty in the contract that the reverted lands would become again privately owned? ("no.")

10. Did the possibility exist of those lands forever belonging to the state? ("yes.")

11. Do appellants claim they would not then have suffered loss? ("no.")

12. Did the possibility of loss always exist for the purchasers of Michigan Drain bonds? ("yes.")

13. Did the passage of Acts 114 and 155 of 1937 aggravate their loss. "No, it salvaged the maximum as contrasted with," supinely allowing them (the lands) to accumulate tax delinquencies with no hope of ever recovering them. (*Baker v. State Land Office Board,* 294 Mich. 587, p. 606).

The allegation is made (p. 16 Brief for Appellants) "In as much as no deficiency assessment has ever been levied, and therefore no lien has been created, the drain district

receives no percentage of the proceeds of the scavenger sale to apply against a future deficiency assessment."

This statement is wholly unwarranted and quite remote from the truth. When the Drain Commissioner filed claim to the district's share of the proceeds of the scavenger sale under Act 155 of 1937, the entire amount due plus the legal statutory interest, was the amount claimed and on which the ratio of distribution was made. If a deficiency levy had been made that day, the same amount would have been spread that was claimed from the state. Counsel inadvertently errs in the foregoing statement.

When counsel attempts to show discrimination between drain bondholders (p. 7 Brief or Appellants) and other municipalities, because they can again levy tax for general obligations when the lands are in private hands and the holders of drain bonds cannot so participate, he completely overlooks the distinction between special and general obligation bonds. The special obligation was no better than its value on liquidation plus revenue from the remaining, live, sources such as tax paying lands and units assessed at large. The general obligation of municipalities was still intact as an obligation of the municipality, retireable from general taxation. Counsel erroneously uses the words "municipal bond" (p. 17 Brief for Appellants) as being snyonymous with "special assessment bonds" and special assessment bondholders know that they do not have a general obligation when they purchase and know that they may suffer loss through reversion of lands to the state.

Making general answer to appellant's claim that "the (drain) bondholders are at a disadvantage" and stand to lose a substantial portion of their investment, we reply as follows:

1. The purchasers of drain bonds speculated the same as any purchaser of securities and the hazard of loss was incident to the speculation;

2. Purchasers of homes speculated in the purchase and were wiped out by thousands;

3. If sanctity attached to either we are forced to conclude that there is nothing more sacred about a bondholder than a home owner;

4. The rights of the few must yield to those of public.

Appellants claim (p. 19 Brief for Appellants) that the decision of the Michigan court prevents them from, "obtaining payment from the remaining lands and the districts at large." Reference to that opinion, (R. 40-47, p. 46) discloses that the units assessed at large are still liable for their portion of any deficiency and the remaining lands in the district are liable also for their portions of the deficiency. In other words, as appellees interpret the decision, the deficiency would be ascertained, principal and interest, then spread as follows:

Oakland County at large.....	3.5%
Troy Township	2.5%
Royal Oak Township.....	6.5%
Village (now City) of Clawson..	10.0%
District 35% of 77.5% or.....	27.125%
Total recoverable	49.625
Loss to bondholders.....	50.375 of deficiency

At no time between the passage of Act 316 of 1923 (the general drain law) and Act 129 of 1939 did a drain bond holder have right to expect more than the above formula would provide in case of a deficiency. If the bonds issued

in the interim were refunded and Act 129 of 1939 became applicable as a result of a deficiency existing after the refunding, then deficiency spreads could have been made each year that a deficiency existed without waiting for all of the bonds to mature, which would have tended to reduce appellant's loss *but Act 129 of 1939 is not here involved because no refunding has taken place.*

Acts 114 and 155 of 1937 did not in any way change the formula suggested above: It would have been the law if those two acts had not been passed. It was the law, unadjudicated but still the law when appellants bought their bonds. *There can be no impairment.*

Appellees have no quarrel with the law laid down in *Von Hoffman v. City of Quincy,* 4 Wall. 535, cited pp. 19-20-21 Brief for Appellants, but we do say that it has no application here other than abstractedly because the Michigan decision gives bondholders everything they were ever entitled to, namely the benefit of the law as it existed when they purchased their bonds (and by way of distinction general obligations are discussed in this case instead of specials).

The same is true as to *Siebert v. Lewis,* 122 U. S. 284, the judgment being a general obligation and the *W. B. Worthen Co. v. Kavanaugh,* 295 U. S. 56, case in no way conflicts with the Michigan decision because if we concede that the slightest impairment is as offensive as the greatest still if *no* impairment exists the holding of the case is not violated in any respect.

The case of *Board of Education of Lincoln Park v. Board of Education of City of Detroit,* 245 Mich. 411, in no way conflicts with appellee's theory here. This case holds that bondholders have a right to look to their "full security." We grant that this is the law and say:

1. The bondholders had their full security on 65% of the drain district, complete foreclosure, sale at auction and participation in the proceeds under the general tax law as their contract called for. If the right to reassess under their contract, conflicted with the extent to which the general tax law modified the drain law, which was also a part of their contract, then the general tax law must be construed to supersede the drain law.

2. The bondholders have now, all rights against the remainder of the district and the municipalities at large, that they had when they purchased their bonds. Having this, there can be no impairment.

On pp. 24-25-26 (Brief for Appellants) are cited may Florida cases which appellants "believe contain the rule applicable here" namely that, "after municipal debts predicated upon the exertion of local taxing power are created, the taxing power cannot be so reduced as to prevent the payment of such debts." At the expense of repetition we say the general statement is true, but such is not the case here. Appellants had the benefit of the law existent when their bonds were purchased. Acts 114 and 155 of 1937 salvaged a portion of their investment along with the security of the State, their liens are intact on the remaining lands and their obligations recognized by the municipalities at large. To ask for more is to ask that their contract be broadened beyond its scope. Their debt was never insured or guaranteed.

Their investments were made voluntarily, subject to the law of the land, the contract had been partly performed, will be further performed under the Michigan decision and all of its benefits are available to them. The hazard of loss, assumed when the bonds were purchased, must go along with the fruits.

3. Appellants criticize the *Baker v. State Land Office Board* case, 294 Mich. 587, and say it upheld a law authorizing the "cancellation of debts" (p. 26, Brief for Appellants) and say further that the Michigan court did not understand the Blaisdell case, 290 U. S. 398 (pp. 27-28, Brief for Appellants).

We refrain, in the interest of brevity, from further discussion here and leave the matter of conclusions to this court. Acts 114 and 155, P. A. 1937 were impartial in operation. Instead of the State acquiring title from from encumbrance five years after purchase, the redemption period was shortened and under Act 114 of 1937, the State acquired title quickly. Counsel admits the State could do this (p. 26, Brief for Appellants). *No liens survived when the State took title.* All were extinguished. Were these bond holders a privileged class? No! All were treated alike. Day by day the possibility of return on their investment became more remote. The snowball of depression was accelerating and threatened to consume all. A wise legislature, exercising a sovereign police power, checked the flood, freed the drowning lands of the weight of existing taxes and liens and floated the ship of State safely into harbor. Now that the crisis is passed, these appellants would "thrice deny their Savior," in the Circuit Court, in the Michigan Supreme Court, and here. Ingratitude is truly the reward of the world.

CONCLUSION

In concluding, appellees respectfully submit:

1. No contract rights have been impaired and Art. I, Section 10, U. S. Constitution has not been violated;

2. The decision of the Michigan Supreme Court should be affirmed.

Respectfully submitted,

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